No. 82-2056

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

ESCONDIDO MUTUAL WATER COMPANY, CITY OF ESCONDIDO and VISTA IRRIGATION DISTRICT, *Petitioners*,

v.

LA JOLLA, RINCON, SAN PASQUAL, PAUMA and PALA BANDS OF MISSION INDIANS, and THE SECRETARY OF INTERIOR IN HIS CAPACITY AS TRUSTEE FOR SAID BANDS, *Respondents*.

**On Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF *AMICI CURIAE* AMERICAN PUBLIC POWER ASSOCIATION, COLORADO RIVER WATER CONSERVATION DISTRICT, AND KINGS RIVER CONSERVATION DISTRICT IN SUPPORT OF PETITIONERS

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December 15, 1983

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C. (202) 347-8203

## TABLE OF CONTENTS

**Table of Contents Continued**

## TABLE OF AUTHORITIES

## Table of Authorities Continued

## Table of Authorities Continued

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## INTEREST OF AMICI

### A. Amici And The Issues Presented

Amici herein are the American Public Power Association ("APPA"), the Colorado River Water Conservation District of Colorado ("CRWCD"), and the Kings River Conservation District of California ("KRCD"). APPA is a national service organization representing more than 1,750 municipal, cooperative, and state-owned electric utilities in 49 states, many of whom operate or seek to operate hydroelectric projects under license from the Commission. CRWCD and KRCD are political subdivisions of their respective states[1] and are both actively engaged in the development of hydroelectric projects as licen-

[1] *See* Col. Rev. Stat. § 37-47-101 (1974 & Cum. Supp. 1981); and Cal. Water Code App. § 59-2 (1968 & Cum. Supp. 1983).

sees, license applicants or preliminary study permit holders.[2] Consent from counsel for all parties to the filing of this brief has been filed with the Clerk of this Court.

Both of the questions addressed by amici involve the interpretation of the first of several provisos to the licensing authority set out in § 4(e) of the Federal Power Act,[3] which deals with the relative responsibilities of the Cabinet Secretaries and the Federal Energy Regulatory Commission ("FERC" or "Commission") when a license relating to an existing or proposed hydroelectric project is to be "issued within any reservation."

The initial question here presented is whether, in case of a dispute over the consistency of license conditions for a license to be "issued within any reservation" with the requirements of the Act as a whole, the Commission or the Secretary of the Cabinet Department under whose supervision such "reservation" falls shall make the final administrative decision.[4]

This case also presents the question of the meaning of the term "reservation," as defined in § 3(2) of the Act, and employed in § 4(e) of the Act, when a license is to be "issued within

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[2] CRWCD has a license application pending before the Federal Energy Regulatory Commission in Project No. 2757, holds preliminary permits in Project Nos. 6644 and 5866, and has an application for a preliminary permit pending in Project No. 2779. KRCD holds licenses in Project Nos. 2890 and 2741.

[3] Occasionally referred to as "the Act" or "the FPA." 16 U.S.C. §§ 791 *et seq.* Section 4(e) appears at 16 U.S.C. § 797(e).

[4] The Secretaries involved in supervising "reservations" as defined in FPA § 3(2), 16 U.S.C. § 796(2), are: the Secretary of Agriculture as to "national forests"; the Secretary of the Interior as to "tribal lands embraced within Indian reservations"; the Secretary of the Army, Navy or Air Force as to "military reservations"; and usually the Secretary of the Interior but occassionally others as to "other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes."

any reservation." The specific question here is whether a licensed project, the boundaries of which are distant from the physical confines of any reservation, is nonetheless "within" a "reservation," for purposes of giving the relevant Secretary licensing authority, solely by virture of the project's impact on downstream water rights appurtenant to the reservation.

### B. The Resolution Of The Issues By The Tribunals Below

The decision below reversed an order of the FERC issuing a license to operate and maintain a hydroelectric project to the Escondido Mutual Water Company, the City of Escondido, California, and the Vista Irrigation District (jointly referred to herein as "Escondido"). The Ninth Circuit majority held that FERC had violated the first proviso of Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), by issuing a license without conditions deemed necessary by the Secretary of the Interior for the adequate protection and utilization of the La Jolla, Rincon, San Pasqual, Pauma, Yuima and Pala Indian Reservations, and had also violated the terms of the Mission Indian Relief Act.

The Commission had before it competing applications for operation of Project No. 176: one, a request for renewal of a 1924 license issued to Escondido;[5] the other, a request for a non-power license for five Indian Bands. The Department of the Interior recommended federal takeover of the project, or in the alternative, the issuance of a license to the Bands. The Commission determined that takeover was inappropriate and that none of the applications would result in satisfactory projects. Pet. App. 109-116, 174.[6] It issued a license to Escondido

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[5] The 1924 license was held by the Escondido Mutual Water Co.; the application for a new license was on behalf of Mutual and the City of Escondido. Vista Irrigation District was ultimately included in the license. The three licensees are herein referred to as "Escondido."

[6] "Pet. App." references are to the Appendix to Petition for Writ of Certiorari filed in this docket.

based upon Escondido's application but with substantial modifications so that the license would not interfere or be inconsistent with the purpose for which the La Jolla, Rincon and San Pasqual Reservations were created or acquired. Pet. App. 110. The Deputy Under Secretary of the Interior had submitted to the Commission preliminary and final sets of "conditions for Project No. 176 pursuant to Section 4(e) of the Federal Power Act in the event a new power license is issued to [Escondido]." J.A. 49-61, 218-42.[7] The Commission rejected or modified many of Interior's conditions, finding them unlawful, in conflict with the findings of fact of the Commission, or unnecessary in light of the modifications of Escondido's license application made by the Commission. Pet. App. 143-155. The Commission also struck certain of the conditions suggested by Interior aimed at safeguarding the Pauma, Yuima and Pala Reservations, reasoning that FPA § 4(e) did not require them inasmuch as the construction, operation and maintenance of project works did not take place within those reservations, and that the conditions were not in accord with the plan for improvement of the area's waterways found by the Commission to be best adapted. Pet. App. 137-38, 150-51, 330-32.

The Ninth Circuit reversed the actions of the Commission, holding that by failing to include Interior's conditions in the license issued to Escondido, the Commission had violated the Federal Power Act's provision that licenses issued within reservations "shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations." The court failed to address the Commission's findings that Interior's conditions were unlawful, contrary to its findings of fact, or unnecessary, but did hold that the Commission had erred in holding that Project No. 176 was not within the Pauma, Yuima and Pala Reservations. The court held that a license which might allow

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[7] "J.A." references are to the Joint Appendix to be filed in this docket.

interference with water rights appurtenant to a reservation is issued "within" that reservation.

We address these questions *seriatim*.[8]

## SUMMARY OF ARGUMENT

The Ninth Circuit majority has held that when a license is to be issued "within any reservation," the first proviso to Section 4(e) of that Act requires the Commission to accept, *in haec verba*, license conditions which may be sought by the Secretary of a relevant department. The basic evil of this holding is that it strips from the Commission, which has the statutory responsibility for assuring that the project is consistent with the public interest, the right even to examine whether the proposed conditions are legal, consistent with the facts as found upon the record which the Commission must amass, or destructive of the public interest. Thus, the Ninth Circuit majority's erroneous construction of Section 4(e) will give executive agencies the uncheckable power to vitiate the licensing process for projects on or upstream from federal reservations by stripping the FERC of its statutory role as the protector of valid federal interests and the arbiter of the public interest, subject, of course, to judicial review, and substituting therefor what is an effectively unreviewable fiat of an executive agency. Moreover, this construction would result in a determination of claims to the use of water by executive agency decree, a result repugnant to the decision of Congress to leave the resolution of such issues to the courts.

Judicial review, which is assumed by the majority below to be a potential *deus ex machina* to salvage the administrative impasse erected by its interpretation, is simply unworkable. The Ninth Circuit's resolution will, if affirmed by this Court, create an administrative morass in which conflicts within the federal government inevitably will result in deadlock, costly

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[8] Because the construction of the Mission Indian Relief Act is an issue more narrow in impact, it is not discussed herein.

and unproductive litigation, years of wasteful delay in the development and improvement of important national resources, and, in the cases where licensing is permitted, the ultimate licensing of inferior hydroelectric projects.

It would appear that the Ninth Circuit's construction of "reservation" would necessarily extend the Commission's licensing authority to embrace projects far from public lands, reservations, or navigable waters whenever they would have any impact on hydrological flows in downstream reservations. This would effect a radical (and almost unbounded) increase in the Commission's licensing jurisdiction, contrary to the language of the statute, and evidently unconsidered by the court below. This holding dramatically amplifies the destructive impact of the Ninth Circuit's subordination of the Commission to the Secretary.

## ARGUMENT

### I. THE DECISION OF THE NINTH CIRCUIT MAJORITY AS TO A SECRETARIAL VETO IS INCONSISTENT WITH THE STRUCTURE OF THE ACT AND CONGRESSIONAL INTENT

The Ninth Circuit's opinion establishes a dual[9] control of the licensing process "within" reservations which is incompatible with the Federal Power Act as a whole, especially its provisions for judicial review. These problems were unexamined below because the court declined to evaluate the Commission's findings concerning the lawfulness and propriety of the Secretary's conditions. Examination of these problems demonstrates the error of the Ninth Circuit's Secretarial veto construction.

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[9] In light of the Ninth Circuit's holding on the meaning of "reservation" expanding the impact of the Secretarial veto holding to apply to any impact upon water rights, there could well be triple or quadruple control since many, if not most, dam sites in the West would affect water rights associated with more than one government reservation.

### A. The Terms Of Part I Of The Federal Power Act Establish The Commission's Preeminent Role In Issuing Licenses

Part I of the Federal Power Act, 16 U.S.C. § 791a *et seq.*, was originally enacted in 1920 as the Federal Water Power Act,[10] modified in 1930 to change the membership of the Federal Power Commission,[11] and supplemented substantially in 1935 when Parts II and III of the Act were added by the Public Utility Act of 1935.[12] Part I of the Act gives the Federal Energy Regulatory Commission[13] broad power to license hydroelectric projects. Thus, under Section 4(e), 16 U.S.C. § 797(e),[14] the Commission is authorized to issue licenses:

> for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the Unted States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam. . .

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[10] 41 Stat. 1063. The Act of March 3, 1921, 41 Stat. 353, revoked the Commission's authority to grant licenses for project works "within the limits as now constituted of any national park or national monument." *See* 16 U.S.C. § 797a.

[11] 46 Stat. 797.

[12] 49 Stat. 838.

[13] The duties of the Federal Power Commission were transferred to the FERC by the Department of Energy Organization Act of 1977. 91 Stat. 565.

[14] Section 4(e) was renumbered in 1935, having previously been Section 4(d) of the Federal Water Power Act of 1920, 41 Stat. 1065-66.

The Commission has exclusive authority to issue licenses enabling citizens, corporations, states, or municipalities to construct, operate, and maintain projects on the navigable waters or public lands and reservations of the United States. FPA §§ 4(e), 23(b), 16 U.S.C. §§ 797(e), 817. The Commission may impose conditions upon a licensee, which conditions must be in conformity in the Act and must be included in the license. FPA §§ 6, 10(g), 16 U.S.C. §§ 779, 803(g); J.A. 325. Such conditions most often arise from the exercise of the Commission's duty pursuant to FPA § 10(a), 16 U.S.C. § 803(a), to ensure that the project adopted will be "best adapted to a comprehensive plan for improving or developing a waterway or waterways . . ." but are also imposed for numerous other purposes required by the Act, when called for in particular cases, pursuant to *inter alia*, §§ 11 and 12, 16 U.S.C. §§ 804, 805. There are other conditions which are required by the Act. See, *e.g.*, §§ 6, 10.

The dispute here arises from the first proviso of Section 4(e). In its entirety, that proviso to the licensing authority set out above states:

> *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation:

It cannot be overemphasized that the only sort of dispute which would raise the legal issues here presented is one in which a Secretary urges conditions which the Commission finds unlawful or inconsistent with the public interest. The Commission must find, subject to judicial review, that a license will not interfere with or be inconsistent with the purpose for which the reservation was created or acquired before a license can issue.

Although the first proviso of § 4(e) states that a license "shall" contain Secretarial conditions regarding reservations, this requirement is qualified by other aspects of Part I of the Act. The first qualification is that the license must contain, and not merely be subject to, the Secretarial conditions. Thus, while such conditions originate with the concerned Secretary, they must be promulgated, if at all, by the Commission pursuant to FPA §§ 6, 10(g). This qualification brings the conditioning process under Commission control. All conditions for the adequate protection and utilization of reservations, like conditions for lights, signals and fishways pursuant to FPA § 18, 16 U.S.C. § 811, are prescribed by the Commission.[15] This may be contrasted with the power of the Secretary of the Army to issue rules and regulations in the interest of navigation governing the operation of certain project works, which power is exercised independently of the Commission. FPA § 18.[16]

The second qualification, found in the express language of the § 4(e) proviso, is that the necessary primary finding that a license will not interfere or be inconsistent with the purpose for which a reservation was created or acquired is entrusted to the

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[15] Section 18 begins:

> The Commission shall require the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of the Department in which the Coast Guard is operating, and such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce as appropriate.

It has long been Commission practice to regard this statutory "shall," like the § 4(e) "shall," as directory rather than mandatory. *See, e.g., Portland General Electric Co.*, 10 F.P.C. 445, 456-57, 458 (1951), *rev'd on other grounds sub nom. Oregon* v. *FPC*, 211 F.2d 347 (9th Cir. 1954), *rev'd*, 349 U.S. 435 (1955).

[16] Prior to 1935, provisions for fishways, lights, and signals were under the control of the Secretary of War, not the Commission. 41 Stat. 1073, 49 Stat. 458.

Commission, not the concerned Secretary.[17] This statutory language has long been regarded by the Commission as giving it the final word in disputes concerning the propriety of issuing licenses within reservations. *See Pigeon River Lumber Co.*, 1 F.P.C. 206, 209 (1935). The Commission's findings of fact are the basis for its actions. License conditions must ultimately be judged in terms of their consistency with the Commission's findings of fact, and the Commission should be permitted to make that judgment, subject to judicial review. The Ninth Circuit's construction, which allows Secretarial conditions to render infeasible a project when deemed necessary by the Secretary despite a finding by the Commission that the license is *not* inconsistent with the reservation's purpose, Pet. App. 24, contravenes Congressional intent as embodied in the proviso.

Plainly, the Commission was intended to be in control of the entire licensing process. The sole exception to the Commission's control of the licensing process is found in the second proviso to FPA § 4(e), which forbids the issuance of a license

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[17] The debates over the bill which became the Federal Water Power Act and its precursors consumed some six years. It may be significant that one of those precursors, H.R. 408, 64th Cong., 1st Sess. § 1, 53 Cong. Rec. 560, 561 (1916), *reprinted in* S. Doc. No. 676, 64th Cong., 2d Sess. 3-4 (1917), which was passed by the House of Representatives on January 8, 1916, 53 Cong. Rec. 744, provided for the issuance of leases by the Secretary of the Interior, provided:

> That such leases shall be given within or through any of said national forests or other reservations only upon a finding by the Secretary of the department under whose supervision such forests, national monument, or reservation falls that the lease will not injure, destroy, or be inconsistent with the purpose for which such forest, national monument, or reservation was created or acquired.

Thus, the Federal Power Act, in making the Commission the finder of fact, represents a deliberate shift from an earlier proposal under which the concerned department head would be the finder of fact concerning the level of interference with a reservation with an explicit veto power.

affecting the navigable capacity of navigable waters of the United States until the plans of all project works affecting navigation have been approved by the Chief of Engineers and the Secretary of the Army. There the statute sets up a clear allocation of authority: the Commission may find on the record that a project is in the public interest, but absent the necessary approval it is explicitly forbidden to issue a license. The fact that there was a clear veto in the second proviso of § 4(e) suggests that Congress did not intend to create an indirect Secretarial veto respecting reservations in the first proviso.

### B. Congress Intended The Commission To Have The Final Word In Disputes With The Departments

The legislative history of the Federal Water Power Act of 1920, 41 Stat. 1063, is of little help in determining whether the Commission could modify Secretarial conditions, because the Federal Power Commission established thereby consisted of the Secretaries of the Interior, Agriculture and War, who among them had supervision of virtually all federal reservations.[18] Disagreements could presumably be settled among the Commissioners, because they were the Secretaries as well. However, the relationship between the Commission and the departments was a focal point of the 1930 Congressional hearings on bills to sever the Commission from the departments and establish it as an independent body.[19] These

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[18] Interior had jurisdiction over national parks, national monuments, and Indian reservations; Agriculture had jurisdiction over national forests; and War had jurisdiction over military reservations.

[19] Although we believe the pre-1930 legislative history to be largely irrelevant, there are two items in the early legislative history which provide some support for the Secretarial supremacy construction. One is a somewhat equivocal statement by Agriculture Secretary Houston during hearings on a precursor to the Federal Power Act that he believed that the bill required the assent of the concerned department head prior to the licensing of a project within a reservation. *Water Power: Hearings Before the House Comm. on Water Power*, 65th Cong., 2d Sess. 678 (1918). The other is a statement by

hearings unequivocally demonstrate that the Commission as a whole was understood to have the final word on projects, even those within reservations.

Respresentations as to the jurisdiction of the Commission (vis-a-vis that of its then members) appear at several places in the 1930 history, and do not appear to have been challenged or even to have been the subject of dispute. Thus, O. C. Merrill, the architect and "one of the principal draftsmen"[20] of the Federal Water Power Act and Executive Secretary of the Commission throughout most of its first decade, clearly stated that when disputes arose, even concerning reservation lands such as national forests, the Commission had the final say, not the department most directly involved.[21] Acting Commission

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Senator Walsh, made during floor debate on an amendment to the Federal Power Act to create a tribal veto for projects on Indian lands ceded by treaty, that the head of the concerned department must agree to the issuance of a license within a reservation under his supervision. 59 Cong. Rec. 1564 (1920). As we note, however, the later history of the Act was based upon much clearer and far less equivocal representations as to Commission power, upon which representations Congress acted to modify the Act consistent therewith.

[20] *Chemehuevi Tribe of Indians* v. *FPC*, 420 U.S. 395, 418 n. 24 (1975). *See also United States* v. *Public Utilities Comm'n*, 345 U.S. 295, 305 n. 10 (1953).

[21] Mr. Merrill testified before Congress in 1930, as follows:

> In my opinion the best way to maintain the jurisdiction and interests of the three departments [when an independent commission is established] is to have the field work in so far as it relates to the issuance of licenses, originally handled as it has been ever since I have been with the Federal Power Commission, through the departments, leaving the final say to the Federal Power Commission. But the three departments have no final say in those matters.

Mr. Merrill answered a specific question about how conflicts between the Agriculture Department and an independent Commission over projects in national forests would be handled as follows:

> The Agricultural Department in such case is cooperating with this new commission, and its officers are making reports upon

Chief Counsel Lawson testified that the Commission "has power to overrule the head of a department as to the consistency of a license with the purpose of any reservation."[22] The Chief Engineer of the Forest Service expressed concern over the inability of the Forest Service to influence the issuance of licenses in national forests should an independent Commission with its own field engineers be established. He gave no suggestion that the Secretary of Agriculture would be able to elevate departmental interests above the Commission's determination through a supreme conditioning authority, as would be the case were the majority holding below to have been thought to be the law.[23] And both the Secretaries of Interior and Agriculture testified that, in their view, departmental interests would be adequately protected by the ability of the departments to intervene in Commission proceedings and present their arguments and reports.[24] There is no indication in the 1930 legislative materials that a Secretarial veto was thought to exist with

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certain projects, with recommendations to the Federal Power Commission. But there is where the responsibility ends. The decision rests with the Federal Power Commission.

Questioning concerning conflicts between the Commission and the departments continued. Mr. Merrill observed:

> It came up while I was in the commission, and we took the position that the commission's decision was final.

*Investigation of Federal Regulation of Power: Hearings Pursuant to S. Res. 80 and on S. 3619 Before the Senate Comm. on Interstate Commerce*, 71st Cong., 2d Sess. 280-281 (1930).

[22] *Id.* at 358.

[23] *Federal Power Commission: Hearings on H.R. 11408 Before the House Comm. on Interstate and Foreign Commerce*, 71st Cong., 2d Sess. 6-7, 14-15 (1930) (Testimony of T. W. Norcross).

[24] *Id.* at 45-46 (Testimony of Agriculture Secretary Hyde), 48-49 (Testimony of Interior Secretary Wilbur). Secretary Wilbur stated:

> I agree with Secretary Hyde that we can well allow these departments to be represented at hearings before the commission to present phases of departmental interest, rather than to have the control remain in the departments. Otherwise, even though

respect to projects on reservation lands by anyone who was involved with the Commission.[25]

### C. The Act's Rehearing And Judicial Review Provisions Compel The Conclusion That The Commission, Rather Than A Secretary, Must Have Ultimate Control

The construction of the Secretary's conditions as immutable is also undermined by the provisions of Section 313 in Part III of the Act, 16 U.S.C. § 825*l* containing administrative provisions governing rehearing and judicial review of Commission actions. Part III was enacted in Title II of the Public Utility Act of 1935, 49 Stat. 838, approved August 26, 1935, which Title also reenacted FWPA § 4(d) as FPA § 4(e). As has been discussed *supra*, Congress had been apprised in 1930 of the Commission's view concerning its power to overrule Secretaries when appropriate. Congress' reenactment of § 4(d) as § 4(e), when taken together with the provisions of Part III which presume the supremacy of the Commission, should be conclusive on the question of the Commission's authority to modify or reject proposed Secretarial conditions. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974).

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> you set up the commission, you will leave in the hands of the Secretaries, or in the hands of the bureau heads, the power to negate whatever the commission may want to do. . . .
>
> I cannot conceive of this Federal Power Commission really being effective unless it controls all power sites where it grants licenses, for if you have to ask permission of this department or that department, there will be difficulties that will be absolutely impossible to overcome.

*Id.* at 48-49.

[25] Secretary Wilbur's testimony concerning the requirement of his approval for a license on the Flathead power site, *Hearings on S. 3619* at 326, should not be mistakenly thought to refer to any requirement derived from the Federal Power Act. Special legislation related to the Flathead power site specifically called for the approval of Interior prior to the issuance of any license. Act of March 7, 1928, 45 Stat. 212-213.

Pursuant to FPA § 313, applications for rehearing are addressed to the Commission, which can modify or set aside, in whole or in part, any finding or order made or issued by it under the Act. Aggrieved parties may petition for review of Commission orders in United States Courts of Appeals, with issues on review generally limited to those presented to the Commission on rehearing. Commission action upon an application for rehearing is an absolute prerequisite for judicial review. Upon review, the Commission's findings of fact, if supported by substantial evidence, are conclusive. The Commission, if ordered by the court, mav take further evidence, modify its findings of fact, and recommend changes in its order. A judgment and decree of the Court of Appeals is final, subject to review by the Supreme Court on certiorari or certification.

These review provisions are incompatible with absolute Secretarial control over license conditions. In the first place, § 313(b) establishes the Commission as the supreme finder of fact. As the Bands recognize in their Brief in Opposition to Petition for Writ of Certiorari at 25, Secretarial control implies that the Secretarial conditions must be governed by Secretarial findings of fact reviewable on a substantial evidence standard. This is totally contrary to § 313(b); besides, it would invite stalemates where the Commission and the Secretary (or Secretaries) make opposing findings of fact, all of which are by substantial evidence and, hence, all of which must be upheld. Section 313(b) says that the *Commission's* findings shall be conclusive, and this provision is fundamentally incompatible with Secretarial supremacy.

In addition, the rehearing provisions of § 313(a) grant the Commission unqualified authority to modify or abrogate its orders at any time prior to the filing with a Court of Appeals of the record in a proceeding. There is no correlative power for a Secretary to abrogate or modify his conditions. This, like FPA §§ 6 and 10(g), is an indication that the ultimate authority over the contents of a license must lie with the Commission, not the Secretaries.

Moreover, if the Commission cannot modify or reject a Secretarial condition, then § 313 commands a useless act as a prerequisite for appeal of a Secretarial condition: an application for rehearing which the Commission is powerless to grant. There is no provision for petitioning a Secretary for rehearing as a prerequisite to judicial review.

The unambiguous evidence for Commission supremacy contained in Part III of the Act is most important, because by 1935 when Part III was added the Commission had become firmly established as an agency independent of the Secretaries of the departments. The potential for conflict between the Commission and the departments was visible, not latent as it had been before 1930 when the Commission consisted of the three Secretaries with supervisory authority over federal reservations. Even before 1930, as the 1930 hearings show, the Commission overruled the departments when necessary. In these circumstances, the provisions of Part III must be understood to govern the construction of the reenacted § 4(e) of Part I, and to render the phrase "shall be subject to and contain" directory rather than mandatory.

## II. THE NINTH CIRCUIT'S DECISION LEADS TO AN UNCHECKABLE SECRETARIAL VETO THROUGH UNREVIEWABLE IMPACT ON COMMISSION LICENSING DECISIONS

The Ninth Circuit majority failed to see any inconsistency between the provisions of the Act as a whole and its construction of § 4(e) making Secretarial conditions binding on the Commission. It stated its view of the matter as follows:

> In the case of a project within a reservation, once the Secretary of the Interior has propounded those conditions deemed necessary for the protection and utilization of the reservation, the Commission is free to modify the proposal in other ways, but not by altering or omitting Interior's conditions, to make it feasible and beneficial to the public. If this cannot be done, the Commission may decline to issue a license at all.

Pet. App. 24. The majority did not believe that this conditioning authority would invest Interior with an "unconditional veto

power," because "[a]ny license issued by the Commission which includes conditions propounded by Interior will be subject to judicial review under Section 313(b) of the FPA." Pet. App. 24-25, 32-33.

The Ninth Circuit's decision will result in either stalemate or the issuance of licenses that do not meet the § 10(a) standard. That decision should be reversed and a construction of the first proviso of § 4(e) adopted which makes the Secretarial conditions not binding terms, but weighty recommendations that may not be modified or rejected without specific Commission findings to support its actions.

### A. Disagreements Between The Commission And A Secretary Will Result In The Denial Of All License Applications And Ineffective Judicial Review

#### 1. When the Commission is presented with Secretarial license conditions which it believes to be unlawful, as happened in this case, a deadlock not readily susceptible of judicial resolution will occur

FPA Sections 6 and 10(g), 16 U.S.C. §§ 799, 803(g), declare that *all* special license conditions binding on a licensee are to be prescribed by the Commission in conformity with the Act. The Commission lacks the power to prescribe a license condition which it believes to be unlawful, *i.e.*, not in conformity with the Act. The Commission expressly found that Interior's proposed Condition 8 was "contrary to the first proviso of Section 10(e) of the Federal Power Act," and that its proposed Condition 11 was "an unlawful delegation of Commission authority to Interior and the La Jolla, Rincon and San Pasqual Bands." Pet. App. 151-52, 154-55. The Commission has no legal power to issue a license containing these conditions.

If, as the Ninth Circuit majority held, the Commission had no legal power to issue a license to Escondido excluding those conditions because of the first proviso of § 4(e), then the Com-

mission would be paralyzed.[27] Its only lawful course of action would be to issue an order denying all license applications on the ground that the Secretary of the Interior had insisted on unlawful license conditions. A frustrated applicant could petition for review of the Commission's orders pursuant to FPA § 313(b), but the reviewing court's powers would be limited by statute to "affirming, modifying, or setting aside, in whole or in part, any such order of the Commission." Thus, if the reviewing Court agreed with the Commission that the Secretary's conditions were unlawful, it could only affirm the Commission's refusal to issue any license. A court cannot authorize the Commission to ignore the statute. Certainly nothing in § 313(b) authorizes a court to reach behind a Commission order and, by its review, control a Secretary's actions.

The Secretary's actions may be reviewed only via the Administrative Procedure Act or by mandamus. However, this would entail a split review procedure for resolving disagreements between the Commission and a Secretary, with the Commission's actions reviewable in one forum and the Secreta-

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[27] It is possible to argue that, because of the mandatory nature of Secretarial conditions, the Commission had legal authority to issue a license containing these conditions, and that the question of lawfulness should be left to the courts. However, there would be no juridical advantage to be gained by requiring the FERC to adopt a condition it believes unlawful, frivolous or unnecessary in order to permit a party to challenge the Commission's order in a reviewing court. *Amici* are not aware of any instance in Anglo-American law where a decisional authority is required to state that it believes a result lawful when it does not. (There may be other legal systems where such a Kafkaesque result is acceptable.) Moreover, there may not necessarily be a party who elects to take an appeal. Certainly the Commission has no statutory authority to petition for review of its own orders. Accordingly, conditions believed by the Commission to be unlawful might remain undisturbed for want of judicial review.

ry's in another. This is the precise outcome which the Ninth Circuit panel envisioned in its initial decision, Pet. App. 24-25, and unanimously rejected as clearly erroneous in response to the Commission's petition for rehearing, Pet. App. 32-33, 39-40. The majority concluded that because there was no split review, the Secretary's actions must also be reviewable under FPA § 313(b). This is erroneous because it violates the plain language of § 313(b).

Assuming that a court could send back a case to FERC with instructions to ignore an unlawful Secretarial condition, there is nothing to prevent a Secretary from replacing the rejected condition with yet another condition that would preclude the project's development. A licensing proceeding could be tied up for years in this manner, giving the Secretary a *de facto* veto by exhaustion. In the interim, where there is a new project proposed, there will be no development. In the case of an existing project, the FERC will issue annual licenses for the operation of the project under the terms and conditions of the expired license pursuant to FPA § 15(a), 16 U.S.C. § 808(a). In the Escondido case, the existing project would be operated under terms substantially less favorable to the Indians than those of the license issued by the FERC in the relicensing case.

The Act must not be construed to countenance this result. The Commission must have the authority to modify or strike unlawful Secretarial conditions so as to enable it to proceed expeditiously with the task of crafting and issuing a license, subject, of course, to judicial review.

**2. When the Commission is presented with Secretarial conditions which are incompatible with the Commission's findings of fact, as happened in this case, an equally intractible deadlock will result**

The same problem that exists with respect to disagreements over the lawfulness of conditions also exist with respect to disagreements over findings of fact. In this form, however, the problem is more likely and hence more significant.

Many of Interior's conditions embodied its disagreement with the Commission's subsequent findings. For example, Interior's Condition 6, which required releases of water to recharge the Pauma and Pala groundwater basins, was flatly incompatible with the Commission's finding that the license it issued, which prohibited such releases, provided for the best use of the San Luis Rey and Escondido Canal waterways for beneficial public uses. Pet. App. 110, 130, 150-151. The Commission could not have issued a license containing Interior's Condition 6 without impermissibly ignoring its own finding of fact. If the Commission cannot discard or modify such conditions, it can issue no license without abdicating its statutory fact-finding responsibilities.

### B. Even If Deadlock Can Be Avoided, A Secretarial Veto Not Controllable By Judicial Review Is Created

If, despite the statutory obstacles just described, the Commission can lawfully issue a license containing Secretarial conditions it deems detrimental to the public interest, we must address the problem of the "unconditional Secretarial veto" raised below. The Ninth Circuit concluded that this "spectre" was illusory and that any ills resulting from improper Secretarial conditions could be remedied on review of the order issuing the license. Pet. App. 24-25, 32-33. This is incorrect; effective judicial review of the propriety of the Secretary's conditions is not possible unless the Commission is free to modify or reject those conditions. The Ninth Circuit's holding must inevitably lead to the issuance of inferior licenses. Accordingly, it should be reversed.

Any conditions deemed necessary by a Secretary are normally transmitted to FERC in what is known as a "4(e) letter," commenting on the originally filed application for license, which FERC routinely sends to affected departments for consideration during the licensing process. *See* J.A. 49-61. However, in a typical case when the Commission issues a license, it makes alterations in an applicant's license proposal, pursuant to § 10(a) and other provisions of the Federal Power

Act. This was the case here, both in the Initial Decision, J.A. 325-333, and the Order Issuing License, Pet. App. 170-221, 257-273. These modifications are made to improve the project in the public interest. Pet. App. 110, 117. However, if Secretarial conditions must be accepted without modification by the Commission, then the Commission is effectively frozen into the applicants' initial license applications together with the Secretary's conditions for protection of the reservation, *see* Pet. App. 147, rather than having the conditions subject to scrutiny by all sides, J.A. 42-26. Because the Secretary is, by virtue of his role, preoccupied with the more narrow, reservation interests, it is almost inevitable that the Secretary's solutions to the problem of protecting a reservation will not reflect the broader public interest required of the Commission. As Interior's representative stated below (J.A. 182):

> [Interior's] trust responsibility to Indians . . . may preclude the kind of fairness, the kind of balancing of interests that normally goes on in the political process.

There is an additional concern with the result below that should not be overlooked. The possibility of an Interior Secretary who would be less generous to the Bands than would the Commission in imposing adequate conditions for the public interest, including the interest of the Bands, is not altogether remote; the ruling below would presumably bar the FERC from conditioning a license in a way more favorable to the Bands.

The end result for at least three of the affected reservations[25] in this case, depending on the interpretation affirmed by this Court, is startling. The FERC noted that the Interior conditions would require the FERC, despite the pendency of water rights litigation in a federal district court for over ten years, to "adjudicate the merits of the existing water rights controversy between the Bands and Mutual and Vista," something the

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[25] These reservations are the La Jolla, Rincon, and San Pasqual reservations, which are traversed by the Project and which the FERC held subject to the Section 4(e) proviso.

Commission could not do. Pet. App. 148. In their stead, the Commission imposed a condition (Article 29, Pet. App. 259-61) that required the licensees to yield water to the affected reservations occupied by Project No. 176 as the members of the Bands developed a need for the water because of additional agricultural, domestic, stockwatering or small commercial consumption, including additional permanent dwellings. Pet. App. 140, 148-149, 260 and esp. 173-190. The Commission held that this condition would give the affected reservations more than the *Winters* doctrine,[29] which is restricted to reserved natural flows. Pet. App. 140. Thus, the Commission's response to Interior's conditions was fashioned to provide for the possible future needs of the three reservations occupied by the project. However, FERC noted that state law would not permit the off-reservation sale of water by the Bands in excess of their use, although the Bands requested water to cover such sales. Pet. App. 129. Thus, only the FERC license condition modifying conditions sought by Interior would be permissible under both state and federal laws, and ensure the simultaneous operation of the hydro project consistent with the purpose of the reservations. As to the water rights claims of all six reservations, the Commission deferred to the pending court proceedings. Pet. App. 259.

By forcing the Commission to accept the Secretary's conditions, the Ninth Circuit majority deprived the Commission of the opportunity to create its own solution to the problem of crafting a license which simultaneously serves the public interest and protects reservations. This means that the Ninth Circuit's decision will create problems not susceptible to judicial review, as the facts below illustrate.

Had the Commission's order below been reviewed on the merits, the first question would have been whether substantial evidence supported the Commission's finding that the license issued was not inconsistent with the purpose for which the

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[29] *See Winters* v. *United States*, 207 U.S. 564 (1908).

relevant reservations were created or acquired. If the license passed this test, the court would proceed to evaluate the Commission's reasons for modifying or rejecting the Secretary's conditions, Pet. App. 147-55. The necessity of Interior's conditions would be evaluated with respect to the license as issued by FERC, including, *e.g.*, the Commission's innovative Article 29. If the Commission's treatment of Interior's conditions were held to be supported by findings based on substantial evidence, it would be upheld and the public interest would be served without harm to the reservations.

By contrast, review of a Commission license which included the Secretary's conditions would proceed very differently. First, the license itself would be very different, and would be less in accord with the Commission's determination of the public interest. Indeed, the Commission might well have licensed the project to the Bands rather than Escondido, or have been forced to do so upon Escondido's refusal to accept a new license containing Interior's conditions.[30] The necessity and propriety of the Secretary's conditions would not be judged with reference to the Commission's optimal license proposal, for that proposal would never have appeared. Pet. App. 147. Rather, the necessity and propriety of the Secretary's conditions would be judged with respect to the license proposals in the record, *i.e.*, the original applications plus any proposed modifications. Judged on this basis, Secretarial conditions inferior to those the Commission might have imposed if given a chance could well be upheld. In this way, an unconditional, unreviewable Secretarial veto is created which cuts off consideration of projects in the public interest.

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[30] The Secretary's conditions necessarily dictate the broad outlines of the ultimate license. This is in essence a usurpation of the Commission's powers.

## III. THE NINTH CIRCUIT'S HOLDING THAT WATER RIGHTS APPURTENANT TO RESERVATIONS OUTSIDE PROJECT BOUNDARIES ARE "RESERVATIONS" UNDER THE ACT IS A MISTAKEN AND UNNECESSARY INTERPRETATION

### A. The Provisions Of Part I Of The Act Do Not Support The Ninth Circuit's Interpretation That "Reservations" Include Water Rights

The Ninth Circuit held that FERC was required to adopt Interior's conditions with respect to all six Indian reservations, even though the project works are not located on three of them, because water rights allegedly appurtenant to those reservations might be affected by the project. Pet. App. 25. The court reached this result, notwithstanding the fact that the first proviso of FPA § 4(e) is expressly applicable only to licenses "within" reservations, on the ground, apparently, that the implied reservation of water rights under *Winters* v. *United States*, 207 U.S. 564 (1908), constitutes a "reservation" within the meaning of the Act. This interpretation is strained because it conflicts with the Act's language and is unnecessary because Indian water rights are otherwise protected through judicial resolution.

Section 4(e) authorizes the construction, operation and maintenance of "project works . . . *upon* any part of . . . reservations of the United States" and states that "licenses . . . issued *within* any reservation" are subject to the Secretarial authority at bar. (emphasis added) Section 3(2) defines "reservations" to include "tribal lands embraced *within* Indian reservations." (emphasis added) "Project works" do not include water rights. FPA § 3(12), 16 U.S.C. § 796(12).

That language, as the Ninth Circuit acknowledged, "tends to paint a geographical picture in the mind of the reader," Pet. App. 26; that is, § 4(e) speaks to those reservations in which the licensed project works are *physically* constructed, operated or maintained. The Commission so found, Pet. App. 330-332, and its construction of the Act is entitled to deference.

Nevertheless, the court construes § 4(e) as if it were directed to reservations which "may be affected by the project," Pet. App. 25, rather than to licenses issued within reservations as the Act provides.

The court's strained reading is without basis. The court reasons that water rights are "reservations" under the Act because water rights are interests in land and because § 3(2) defines "reservations" to include

> tribal lands embraced within Indian reservations . . . and other lands and interests in lands . . .

Pet. App. 25-26. But Congress could not have had water rights in mind when it referred to "interests in lands." Logically, tribal lands are not "embraced within" water rights. Furthermore, § 3(11) of the Act, in defining "project," lists "water rights" separately from "interest in lands," indicating that for purposes of the Act the former was not included within the latter.[31]

The Ninth Circuit's strained reading of § 3(2) leads it to conclude the language of § 4(e) is ambiguous. The court resolves the ambiguity in favor of the Indians because it claims that the ambiguity is in a statutory clause passed for the "precise purpose" of benefitting dependent Indian tribes. Pet. App. 27. However, the first proviso of § 4(e) is addressed to the protection not just of Indian reservations but of *all* reservations as generally defined by the Act to include national forests, military reservations, "other lands and interests in lands owned by the United States and withdrawn . . . from private appropriation and disposal," and "lands and interests in lands acquired and held for any public purposes." Section 3(2). In that light, the language in question cannot fairly be said to be primarily for the benefit of Indian tribes," let alone for this "precise purpose."

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[31] The court's expansionist reading of "interests in lands" to embrace water rights is unmindful of the fact that the Act's definition of "reservations" was "artificial" and is not intended to correspond to the common meaning of that term. *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 111 (1960).

Indeed, the most direct impact of the Ninth Circuit's expansion of the definition of "reservations" is in the body of § 4(e), where it would impose upon the Commission the obligation to license projects far from navigable waters, public lands, or reservations whenever such projects might affect claims to water rights appurtenant to distant reservations. *See infra.* Even if the first proviso of FPA § 4(e) is seen as a provision for the protection of Indians, it stretches credibility to read "that precise purpose," Pet. App. 27, into the very definition of the Commission's licensing jurisdiction so as dramatically to expand that jurisdiction. The Ninth Circuit seems never to have considered the full impact of its construction.

In practical terms the Ninth Circuit's construction requires the Commission to issue licenses based upon findings relating to water rights which could be (as here) in dispute and unadjudicated.[22] Interior would, of course, prefer to pursue the Indians' water rights claims in a FERC licensing proceeding where its conditions cannot be rejected, rather than in court. But there is no authority to adjudicate water rights in a FERC licensing proceeding. Pet. App. 99, 184; FPA § 27, 16 U.S.C. § 821; *First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U.S. 152, 175 (1946) Although the Commission requires, under FPA § 9(b), satisfactory evidence from an applicant that it has the right "to the appropriation, diversion, and use of water for power purposes . . .," protection of the right to "an allotment of water necessary to make the reservation livable," is a judicial function. *Arizona* v. *California*, 103 S.Ct. 1382, 1390 (1983)[23] Moreover, the Ninth Circuit's formulation, in which

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[22] Indeed, under the theory of the Ninth Circuit's ruling, Secretarial claims might well have been denied in state water adjudication proceedings, and nevertheless be binding on FERC if requested by the Interior or other departmental Secretary as a necessary condition in that forum. Interior so argued below. J.A. 177-78.

[23] Accordingly, the Commission has long and consistently held that it is not an appropriate forum for the resolution of water rights conflicts. See, *e.g.*, *East Bay Municipal Utility District*, 1 F.P.C. 12, 13 (1932); *Seneca Nation of Indians*, 6 F.P.C. 1025, 1026 (1947); *Rumford Falls Power Co.*, 36 F.P.C. 605, 607 (1966); *Essex Co.*, 56 F.P.C. 977, 978 (1976); *Southern California Edison Co.*, 23

Interior serves the dual role of advocate and arbiter for the same tribal water rights claims, contravenes this Court's conclusion in *Arizona* v. *California*, 103 S.Ct. at 1400, 1402 n.28, that *ex parte*, unadjudicated Secretarial determinations of water rights issues should not be binding determinations.

There was no requirement for this strained and novel interpretation. The court below was well aware that the question of the right to the use of waters among the parties involved was in litigation in a United States District Court having jurisdiction over the controvery, and that the litigation had been ongoing since mid-1969. Pet. App. 7. FERC, recognizing that it has no jurisdiction to declare water rights, included within the license for the Escondido project a condition which would permit it to modify the license, as appropriate, to recognize the disposition of the water rights litigation. Pet. App. 259. This has been the Commission's consistent approach in licensing proceedings with underlying water rights controversies. *See, e.g., Southern California Edison Co., supra*, 23 F.E.R.C. ¶ 61,240, pp. 61,514 and 61,519 (Article 33); *Pacific Gas & Electric Co., supra*, 25 F.E.R.C. § 61,010, pp. 61,056 and 61,074 (Article 50). However, the Ninth Circuit's decision in effect would impose a Secretarial decision on water rights claims appurtenant to reservations in a new forum, that is, the FERC.

Courts should be circumspect about declaring interpretations that are unnecessary for the purposes of a particular case and that can only bring mischief in their further applications. *Cf. Barr* v. *Matteo*, 355 U.S. 171, 172 (1957). This is particularly true in the delicate area of water rights, which has always been of critical importance in the West and which are becoming increasingly significant throughout the Nation. The court below, in fashioning a construction of the statute to assist the Indian reservations downstream unfortunately overlooked the

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F.E.R.C. ¶ 61,240, p. 61,511 (May 18, 1983), *reh'g denied*, 24 F.E.R.C. ¶ 61,119 (July 22, 1983); *Pacific Gas & Electric Co.*, 25 F.E.R.C. ¶ 61,010, pp. 61,056-57, 61,075 n.11 (Oct. 4, 1983).

fact that reservations are legion, and under the court's broad language may be argued as even more universal. Conditions might be imposed upon the Commission on behalf of a wilderness study area, a wild or scenic river study section, a fish and wildlife refuge or whatever other "reservation" a Secretary might assert to exist,[34] however far downstream it might be from the project involved. The extensive and necessarily interrelated properties of water, streams, tributaries, reservoirs, and rivers would give such a reading a virtually unlimited reach. Thus, it is not only straining unnecessarily to include implied reserved rights within the technical meaning of "reservation" under the Federal Power Act, but it exposes numerous existing licensees as well as pending license applicants to undefined, unknown obligations against their projects which are totally unwarranted.

While there, of course, must be concern to protect Indian entitlements fully, this must not be to the exclusion of all other rights and obligations which might be involved. Certainly, an additional new forum is not needed in light of the holdings of this Court during the past term in *Arizona* v. *California*, *supra*, *Nevada* v. *United States*, 103 S.Ct. 2906 (1983), and *Arizona* v. *San Carlos Apache Tribe* (the McCarran Act cases), 103 S.Ct. 3201 (1983), which gave recognition to the protection of such rights in the context of the water rights of all who might be involved.

### B. The Court's Construction Of "Reservations" Is Inconsistent With The FPA As It Impermissibly Expands Both The Secretarial And FERC's Jurisdiction

If the Ninth Circuit's construction of the term "reservations" as embracing water rights is upheld, the Commission's licensing authority will be expanded dramatically. Federal reservations may carry with them implied reservations of such water supplies as are necessary for their purposes. Virtually

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[34] *See Pacific Gas & Electric Co.*, *supra*, 25 F.E.R.C. ¶ 61,010, where Indian tribes asserted the need for water to support a fishery adequate to maintain alleged fishing rights.

no hydro project in the Western United States fails to affect water flows into one or more federal reservations. All of these projects will be "upon any part of . . . reservations of the United States," and will therefore require Commission licenses. FPA §§ 4(e), 23(b). When combined with the holding that the Commission has no power to modify or reject Secretarial conditions for the protection of reservations, this expansion of opportunity for Secretarial "participation" is a recipe for disaster, particularly when more than one Secretary dictates immutable conditions.[35] It is no exaggeration to say that the combined impact of these two aspects of the Ninth Circuit's decision threatens to preclude much future hydro development in this country, and to freeze present hydro projects in a less than satisfactory state.[36] The ability of a Secretary to deadlock and manipulate the licensing process by means of his conditions, examined *supra*, will discourage many license applicants from proceeding in the face of departmental opposition.

## CONCLUSION

The Ninth Circuit made two errors in its construction of the first proviso of Section 4(e) of the Federal Power Act. Each error will, if allowed to stand, have severe detrimental impact on the Commission's ability to fashion licenses in the public

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[35] *Cf. Pacific Gas & Electric Co.*, 6 F.P.C. 729 (1947), where the Commission was forced to reject conditions of the Secretary of Agriculture and the California Fish and Game Division for fish protection within national forests because the conditions were inconsistent. The Commission would lose its ability to mediate under these circumstances if the Ninth Circuit is upheld.

[36] As noted *supra*, if a stalemate prevents the Commission from issuing a new license for an existing project, then the Commission must continue to issue annual licenses to the prior licensee. *Lac Courte Oreilles Band* v. *FPC*, 510 F.2d 198 (D.C. Cir. 1975); FPA § 15(a), 16 U.S.C. § 808(a). Because license terms cannot be altered in an annual license, modifications in the public interest could not be made while the stalemate continued.

interest, without in any way advancing the interests of protecting tribal lands embraced within Indian reservations. The decision of the Ninth Circuit should be reversed.

Respectfully submitted,

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